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Supreme Court of the United States

OCTOBER TERM, 1947

No. 360

BALLESTER HERMANOS, *Petitioner*,

v.

RAFAEL BUSCAGLIA, *Treasurer of Puerto Rico, Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

BALLESTER HERMANOS, *Petitioner,*

v.

RAFAEL BUSCAGLIA, *Treasurer of Puerto Rico, Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, through its undersigned attorneys, prays issuance of a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, to review the judgment entered July 17, 1947, in Docket Number 4233 (October Term, 1946 of that Court, there entitled RAFAEL BUSCAGLIA, *Treasurer, Intervenor, Appellant,* versus BALLESTER HERMANOS, *Petitioner, Appellee,* vacating a judgment in favor of the petitioner rendered by the Supreme Court of Puerto Rico on July 26, 1946.

SUMMARY SHORT STATEMENT OF MATTERS INVOLVED.

This action arises from an attempt by the Respondent Treasurer of Puerto Rico, over petitioner's protest, to apply the insular direct property tax, assessable on January 15 each year, to certain imports which throughout the assessment date and several days thereafter were in a Puerto Rican harbor still on the importing ship and in federal customs custody.

Petitioner's objections to the exaction are that it is in operation and effect a customs duty imposed wihout sanction of local law, and in violation of federal statutes defining and limiting the taxing powers of the Puerto Rican government.

The insular property tax in question is that prescribed by Chapter I, Title IX, of the Puerto Rican Political Code of 1902, which in Section 285, imposes taxes aggregating one per centum for each fiscal year upon the value of all real and personal property in Puerto Rico, and of all personal property of persons residing in Puerto Rico, and in Section 297 directs (App., *infra,* pp. 48-49, 50):

> "That all personal property within or without Puerto Rico shall be assessed to the owner thereof in the municipality in which he resides on the fifteenth day of January," * * *

Federal laws most directly involved are:

> (1) Sections 2, 3 and 4 of the first Puerto Rican Organic Act of Congress, approved April 12, 1900 (31 Stat. 77 et seq.; hereinafter called the Foraker Act; App., *infra,* pp. 45-46), Section 2 of which extended the federal tariff laws to all articles imported into Puerto Rico from foreign ports, by necessary implication forbidding Puerto Rico to impose other tariffs, customs or duties on such imports; and
>
> (2) The following parts of the second and now current Puerto Rican Organic Act of Congress, approved

March 2, 1917 (39 Stat. 951 et seq.; hereinafter called the Jones Act):

(a) The first (due process) clause of Section 2 (App., *infra*, pp. 46-47);

(b) Section 3 as originally enacted (App., *infra*, p. 47), expressly authorizing the insular legislature to impose *taxes and assessments on property, internal revenue, license fees* and *royalties;*

(c) Section 3 as amended by Section 1 of the Act of March 4, 1927 (44 Stat. 1418; hereinafter called the Butler Act; App., *infra*, p. 47), inserting "*income taxes*" among the separate categories of taxes mentioned in the original text of the section, and adding thereto a proviso, hereinafter called the Butler proviso, permitting the legislature to direct the levy and collection of local "internal-revenue taxes" on articles subject thereto, "as soon as the same are * * * brought into the island."

(d) Section 58 (App., *infra*, p. 48), continuing in effect all laws applicable to Puerto Rico, and not in conflict with this act, including expressly "the laws relating to tariffs, customs, and duties on importations into Puerto Rico prescribed by" the Foraker Act of 1900.

The essential basic facts are not in controversy, and may be outlined succinctly as follows:

On Janury 13, 1943, a ship of Argentinean registry bearing merchandise valued at $118,250.00, from Argentina, consigned to the petitioner at San Juan, Puerto Rico, arrived in the harbor of that city and there passed into custody and control of the local United States customs authorities. The ship and cargo remained in the harbor under customs control until the 18th to 20th of January, 1943, when the merchandise was released by customs, unloaded and delivered to petitioner (R. 6).

Meanwhile, January 15, 1943, the date of assessment of the annual *ad valorem* property tax above mentioned, for the fiscal year 1943-1944, had passed.

In petitioner's personal property tax bill for that fiscal year, the respondent included an item of $3,382.12, based on an assessment of the imported merchandise above mentioned. Petitioner contested the validity of that item before the Tax Court of Puerto Rico, where the respondent was upheld (R. 5-16). The disputed item was then paid under protest, and petitioner petitioned for review by certiorari in the Supreme Court of Puerto Rico, assigning as errors, *inter alia*, erroneous application of the pertinent Political Code provisions imposing the tax, and failure to hold the disputed exaction to be violative of the due process clause of Section 2 of the Puerto Rican Organic Act (R. 1-4).

The latter Court reversed the Tax Court, and remanded the case with instructions to enter an order in favor of the petitioner, holding in substance that the tax as applied constituted in substance a local customs duty, was not an "internal revenue tax" within the meaning of Section 3 of the Jones Act as amended by the Butler Act, and was forbidden by Section 2 of the Foraker Act (R. 17-43).

The respondent appealed to the United States Circuit Court of Appeals for the First Circuit, where the judgment of the Puerto Rican Supreme Court was vacated by the judgment of July 17, 1947, to which this petition relates, the opinion ignoring petitioner's point that the tax in question as applied in this case is without authority of local law, and holding in substance that even if the disputed levy is in effect a duty or impost on imports, it is nevertheless valid as an "internal revenue tax" within the meaning of that part of Section 3 of the Jones Act, added by the Butler Act (R. 50-56).

JURISDICTION.

This being a civil cause in a circuit court of appeals, it falls squarely within the plain terms of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U.S.C. 347), conferring jurisdiction upon this Court to require by certiorari that any such cause be certified to this Court for determination.

The three months allowed by Section 8a of the act last mentioned (43 Stat. 940; 28 U.S.C. 350) for filing this petition expires October 17, 1947.

QUESTIONS PRESENTED.

Local.

1. Assuming (only for the purpose of stating and considering this question) that the Legislature of Puerto Rico was empowered by the Butler Act of 1927 to authorize application of the insular property tax to imports, as attempted in 1943 by respondent in this case, do Sections 285 and 297 of the insular Political Code of 1902, as amended, provide such authorization as a matter of local law?

Federal.

2. Does Section 3 of the Jones Act of 1917, as amended by the Butler Act of 1927, empower the Puerto Rican Legislature to authorize application of the insular property tax to imports, as attempted by the respondent in this case?

REASONS FOR ALLOWANCE OF THE WRIT.

Referring to Rule 38(b)5 of this Court, petitioner respectfully urges that the writ here sought should be granted because the Circuit Court of Appeals in this case has:

(1) Violated an important rule of decision often reaffirmed by this Court, by disregarding reasons urged by the appellee, sufficient in themselves to support the judgment

of the insular Supreme Court although not mentioned and perhaps not considered by that Court.

(2) Reversed on federal grounds not material to the case, a judgment of the Supreme Court of Puerto Rico which is clearly right as a matter of local law;

(3) Decided an important question of federal law which has not been, and should be, settled by this Court; and

(4) Misconstrued and misapplied general expressions in the opinion of this Court in *West India Oil Co.* v. *Domenech*, 311 U.S. 20, by disregarding the facts and issues of that case, in violation of a basic and well established rule of interpretation of judicial precedents.

The Local Law Question.

Referring to the question of local law above stated, petitioner contends that the only logical answer to that question is *no*. At the time of the enactment of the Political Code in 1902, and at the time of the amendment of Sections 285 and 297 thereof in 1908 and 1910, respectively, to read as they now stand (App., *infra*, pp. 48-49, 50), Section 2 of the Foraker Act, which by implication (but none the less positively) prohibited local direct taxation of imports (App., *infra*, p. 45), was in full force and effect, and it continued so until modified by the Butler Act of 1927, since which it has continued in effect as thus modified.

Sections 285 and 297 of the Code, although literally broad enough to do so, could not at the time of their original enactment in 1902, or as amended in 1908 and 1910, have been construed to authorize application of the property tax to imports, because such construction would have brought them to that extent into direct and irreconcilable conflict with that part of the then current organic law of the island comprised in Section 2 of the Foraker Act.

In short the insular legislature cannot be held or presumed to have intended by the Political Code provisions in question to violate the mandate of the Congress in Section

2 of the Foraker Act by authorizing application of the property tax to imports still in course of importation. It follows that Sections 285 and 297 of the Code, as amended, must be construed, *ab initio* as if they had contained or been accompanied by express exemption of imports from their application.

The session laws of the Puerto Rican legislature down to and inclusive of those of the regular session of 1945, disclose no act of that body purporting to change that construction, or to authorize application of the property tax to imports still in course of importation. The opinion of the insular Supreme Court in this case, dated July 26, 1946, mentions no such act, nor does the opinion of the Circuit Court of Appeals, rendered July 17, 1947.

After enactment of the Butler Act in 1927, the insular legislature promptly availed itself of the additional authorization of that act, by extending the application of certain insular excise taxes, previously imposed by the "Internal Revenue Law of Puerto Rico" (Act No. 85, approved August 20, 1925; Laws of P.R., 1925, pp. 584 *et seq.*) only on manufacture, sale, use or consumption of various articles, so as to make the excises apply also to introduction of the articles into Puerto Rico (Act. No. 17, approved May 25, 1927; Laws of P.R., 1927, pp. 458 *et seq.*). But the legislature has never, at least up to the adjournment of the regular session of 1945, two years after the assessment in controversy in this case, made any corresponding attempt to extend the applicability of the property tax to imports, leaving unchanged Sections 285 and 297 of the Political Code, as amended in 1908 and 1910, and their necessary construction *ab initio* as inapplicable to imports. A more comprehensive statement of the pertinent actions and reactions of the insular legislature, appears in the supporting brief, under Point III (*infra*, pp. 29-33).

The conclusion is therefore inescapable that, regardless of the answer to the federal question above stated, and be-

low discussed; that is, whether the insular legislature was empowered by the Butler Act of 1927 to extend the application of the property tax to imports, the fact is that that body had never, at least until more than two years after the date of the assessment in question here, undertaken or attempted to do so.

Although these considerations were fairly presented to the Circuit Court of Appeals by written brief (Cert. Copy, Point III, Brief for Appellee; App., *infra*, pp. 51-52) and oral argument on behalf of the petitioner, that Court made no mention of them in its opinion, treating the case as one involving only the federal question whether the insular legislature had power to impose the protested tax.

Nevertheless it is apparent that the respondent was wholly without the sanction of local law in his attempted application of the property tax in this case. It is also evident that this point alone was and is decisive of the case, and that the Circuit Court of Appeals clearly erred in refusing or failing to entertain the point, and in failing to affirm the judgment of the insular Supreme Court on that ground.

It is true that the Supreme Court of Puerto Rico did not expressly base its judgment on this point, and did not discuss or mention it. Nevertheless we believe the question of the sufficiency of Sections 285 and 297 of the Political Code, as a matter of local law, to authorize the Treasurer's attempted application of the property tax to imports, was fairly raised by the petitioner in his petition to the insular Supreme Court for certiorari to the Tax Court, expressly alleging error by the Tax Court in its application of Section 297 of the Political Code, and in substance, in its failure to hold the attempted application of the tax to involve a deprivation of property in violation of the due process clause of Section 2 of the Organic Act (R. 4).

In any event the question of the authority of the respondent under local law to so apply the property tax was obviously inherent in the case from the beginning, and was

certainly brought very definitely to the attention of the Circuit Court of Appeals, as above indicated.

It is well settled in federal practice that an appellee may urge, or the appellate court on its own motion may consider, any theory, argument, or reason in support of a decision of a lower tribunal, regardless of whether such theory, argument or reason was relied upon or even considered or suggested in the lower tribunal. *White* v. *Higgins,* 116 F. 2d 312, 318, and cases cited therein, including *LeTulle* v. *Schofield,* 308 U.S. 415, 421, 60 S. Ct. 313, 84 L. Ed. 355, and *Helvering* v. *Gowran,* 302 U.S. 238, 245, 58 S. Ct. 154, 82 L. Ed. 224.

The importance of the question of local law thus presented, and of the erroneous action of the Circuit Court of Appeals with relation thereto, as reasons for granting certiorari, is of course not properly to be measured by the comparatively small amount of money directly involved in this particular case, but rather by the importance of the principles involved, and of the precedent that may be established by the refusal of that Court to take account of the point, together with the obvious vital and adverse bearing of that precedent on the rights of other appellees before that Court in pending and future cases.

The foregoing discussion of the question of local law presented is supplemented by the argument in the appended supporting brief under Points I, II, III, and IV (*infra,* pp. 16-42).

The Federal Question.

As already indicated, counsel for the petitioner are convinced that the federal question stated (*supra,* p. 5) does not properly arise in this case. If the insular legislature had never sanctioned application of the property tax to imports (and for the reasons above stated we think that is undoubtedly true notwithstanding the broad literal terms of the old local taxing statutes in question), then it is clearly immaterial here whether the legislature was or was not

legally empowered by Congress to authorize such application.

Subject to that comment, petitioner respectfully urges that the Circuit Court of Appeals not only erred in reversing the holding of the insular Supreme Court to the effect that the insular legislature has never been so empowered, but in doing so has decided an important question of federal law which has not been, but should be, settled by this Court.

Where, as here, the highest Court of an organized insular territory of the United States, with a population of the upwards of two millions, and the United States Court of Appeals having immediate appellate jurisdiction, disagree diametrically upon a question of the extent of the power of the territorial legislature to tax imports, the great importance of the issue seems too self-evident to need much further demonstration. Considering also that the question bears directly upon the extent to which the Congress, with relation to Puerto Rico, has surrendered its generally well guarded and maintained immediate control over commerce between the States, Territories, and territorial possessions of the United States, on the one hand, and foreign countries on the other, the propriety and wisdom of a final settlement of the matter by the highest judicial tribunal of the Nation is, we think, more than manifest.

The determination of this federal question turns on the proper interpretation of the expressions "internal revenue" as employed in the original text of Section 3 of the Jones Act of 1917, and "internal revenue taxes" as used in the provisions added to that section by the Butler Act of 1927. The original text of the pertinent part of the section, as well as the amended text with the original words in roman type and those inserted or added by the Butler Act in italics, appear in the Appendix (*infra*, p. 47).

Respondent contends and the Court of Appeals held (R. 55), in substance, that as employed in the Butler proviso of Section 3 of the Jones Act, the words "internal revenue taxes" include all taxes which a government may impose

except duties on imports, therefore include the insular property tax in question here, and thus sanction the application of that tax to imports, as attempted by respondent in this case.

Convincing evidences of the unsoundness of that theory are pointed out in that part of the opinion of the insular Supreme Court supporting its conclusion that property taxes are not "internal revenue taxes" under Section 3 of the Jones Act, as amended (Part V, R. 31-36).

Additional evidences to the same effect, clearly indicating that the term "internal revenue taxes" was used by Congress in the Butler Act to denote only excise taxes like those imposed by the self-styled "Internal Revenue Law of Puerto Rico" (Act No. 85 of August 20, 1925; Laws of P.R., 1925, pp. 584 *et seq.*), were brought to the attention of the Circuit Court of Appeals, and are set forth in the supporting brief (*infra*, pp. 29-33).

While mentioning some of these vital internal and external indicia as to the particular sense in which the Congress employed the term in the Butler Act, the Circuit Court of Appeals erroneously brushes them all aside with blunt declarations to the effect that the words "internal revenue taxes" do not describe a narrow category of taxes, but that they are used to describe all taxes in general derived from internal sources, and cites the opinion of this Court in *West India Oil Co.* v. *Domenech*, 311 U.S. 20, as supporting that view of the term as it appears in Section 3 of the Jones Act (R. 54-55).

In the case last mentioned the only taxes involved were excise taxes imposed by the "Internal Revenue Law of Puerto Rico," *supra*, no question of their nature as "internal revenue taxes" under the Butler Act was presented, and the insular property tax was not even mentioned. Yet the Circuit Court of Appeals quotes certain general expressions from that opinion, construes them as holding in effect that the property tax is an internal revenue tax under the Butler Act, and appears to have relied upon them

very largely, if not wholly, to support its conclusion to that effect in the present case.

This obvious misconstruction and misapplication of the last mentioned opinion of this Court provides in itself, we believe, a further sound reason for granting the writ. Supporting brief, *infra*, pp. 26-29.

Further considerations relevant to the merits and importance of the federal question above discussed, also appear in the supporting brief, under Points I, II and III (*infra*, pp. 16-36).

CONCLUSION OF PETITION.

For the reasons outlined above, and more fully discussed in the appended brief, this petition should be granted, and upon due hearing and consideration the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

Date: September 20, 1947.

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Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

BALLESTER HERMANOS, *Petitioner,*

v.

RAFAEL BUSCAGLIA, *Treasurer of Puerto Rico, Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

(1) The opinion of the United States Circuit Court of Appeals for the First Circuit, rendered July 17, 1947, to which this petition directly relates, is not yet officially reported. The text appears in the record, beginning on page 50.

(2) The opinion of the Supreme Court of Puerto Rico, rendered July 26, 1946, is not yet officially reported in English. An English version appears in the record, beginning on page 17.

(3) The English text of the opinion of the Tax Court of Puerto Rico, rendered February 23, 1915, is also in the record, beginning on page 5.

JURISDICTION.

See Petition, *supra*, p. 5.

STATEMENT OF THE CASE.

See "Summary Short Statement of Matters Involved", Petition, *supra*, pages 2-4.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

(1) In failing to hold definitely that on the date of assessment of the disputed tax, the property assessed was in course of importation into Puerto Rico from Argentina, and therefore comprised articles being imported into Puerto Rico from ports other than those of the United States within the plain letter and intent of Section 2 of the Foraker Act;

(2) In failing to affirm the judgment of the insular Supreme Court as a matter of local law, upon the ground that the insular legislature, regardless of whether it was empowered by Congress to do so, had never undertaken or attempted to authorize the application of the property tax to imports in course of importation from a foreign country;

(3) In holding that the insular legislature is empowered by Section 3 of the Jones Act, as amended by the Butler Act, to authorize such application; and

(4) In reversing and vacating the judgment of the insular Supreme Court, and directing that Court to enter judgment consistent with the opinion of the Circuit Court of Appeals.

STATEMENT OF POINTS AND SUMMARY OF ARGUMENT.

(1) On the date of assessment of the disputed tax, the property assessed was in course of importation into Puerto Rico from Argentina, and therefore comprised articles being imported into Puerto Rico from ports other than those of the United States within the plain letter and intent of Section 2 of the Foraker Act. This section is still in force pursuant to Section 58 of the Jones Act of 1917, and by necessary inference bars the imposition by Puerto Rico, without the consent of Congress, of any tariff, custom or duty upon any article imported into Puerto Rico from any port other than a port of the United States. (Point I, *infra*, pp. 16-22).

(2) The Puerto Rican Legislature had never undertaken or attempted to authorize application of the insular property tax to articles in course of importation into Puerto Rico from foreign countries, respondent was wholly without authority of local law to assess or collect the protested exaction, and the judgment of the insular Supreme Court should have been affirmed on this ground (Point II, *infra*, pp. 22-24).

(3) The Butler proviso of Section 3 of the Jones Act affords no authorization whatever for the application of the property tax to imports from foreign countries (Point III, *infra*, pp. 24-36).

(4) The property tax, as attempted to be applied by the Treasurer, is a direct tax on importations into Puerto Rico from foreign countries, and amounts in operation and practical effect to a local tariff or customs duty, the imposition of which is forbidden by federal law (Point IV, *infra*, pp. 37-42).

(5) At most, the arguments advanced by the Circuit Court of Appeals in support of the disputed exaction leave obvious and substantial doubts of its validity, which should

be resolved in favor of the taxpayer under well-established principles governing the construction of taxing statutes (Point V, *infra*, pp. 42-43).

ARGUMENT.

Point I.

On the date of assessment of the disputed tax, the property assessed was in course of importation into Puerto Rico from Argentina, and thus comprised articles being imported into Puerto Rico from a port other than a United States port within the meaning of Section 2 of the Foraker Act.

The facts stated in the initial phrase of the foregoing caption are plainly established by the record. On the assessment day, January 15, 1943, the assessed merchandise was still on board the importing ship. True the ship was in San Juan Harbor, but it was still in the custody of the local federal customs officials awaiting completion of their inspection and formal customs release. These conditions continued until from three to five days after the assessment date, when the release was granted and the merchandise unloaded (R. 6).

Respondent argued below, that under these circumstances the goods were no longer in transit on January 15, but had then already come to rest in Puerto Rico, and in substance, that the process of importation had been completed and the merchandise had become subject to local property taxation when the importing ship had entered San Juan Harbor on January 13.

The Supreme Court of Puerto Rico had rejected that contention, holding that the process of importation was not complete until at least disembarkation and delivery of the merchandise to appellee, and supported that conclusion by reasoning so comprehensive and convincng as to admit of but slight elaboration (R. 39-43).

The Circuit Court of Appeals did not discuss the present point, and made no definite ruling upon it, simply declaring in substance that even though the application of the property tax to petitioner's merchandise might make that tax in effect a duty or impost on imports, nevertheless it is a tax which Congress has authorized the insular legislature to impose (R. 55-56).

The question whether importation in this case had been completed on the tax day, or in other words, whether the assessed merchandise on that date still continued in the status of imports into Puerto Rico from a port other than a United States port, within the meaning of Section 2 of the Foraker Act, must be resolved primarily in harmony with the terms and intent of that section, which the insular Supreme Court held (R. 28), and it is generally conceded, was continued and still remains in force by reason of the saving clause of Section 58 of the Jones Act (39 Stat. 968; App., *infra*, p. 48), and which for ready reference we here set forth in pertinent part [Sec. 2, Act of April 12, 1900 (31 Stat. 77), as amended only with relation to the spelling of Puerto Rico by the Act of May 17, 1932 (47 Stat. 158); App. *infra*, p. 45]:

> "Sec. 2. That on and after the passage of this Act the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Puerto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries" . . .

In Sections 3 and 4 of the same Act (31 Stat. 77-78), also quoted in the Appendix hereto (*Infra*, pp. 45-46), the Congress provided for free trade between the island and the United States, and committed the administration of the customs service and the collection of the prescribed customs duties in Puerto Rico, not to any insular authority, but to the Secretary of the Treasury and to the officers, agents and assistants appointed by him (i.e., the federal customs serv-

ice), although directing that the proceeds be paid into the insular treasury.

Manifestly, these provisions, included by the Congress in the first organic act for Puerto Rico, were intended to put that territorial possession in substantially the same position, with regard to the power to impose imposts or duties on imports, as that occupied by the states under the Import-Export Clause of the Constitution; that is, for the most part, to prevent local interference with federal control over interstate and foreign commerce of the United States. There was certainly no apparent reason for investing Puerto Rico with greater local power in this respect than that possessed by the states under the federal Constitution.

The lack of lawful power on the part of the Puerto Rican Legislature, without the consent of the Congress, to impose tariffs, customs or duties on imports is further strongly evidenced by Section 3 of the Jones Act, as originally enacted on March 2, 1917 (App., *infra*, p. 47). In support of that statement we first invite attention to the cogent reasoning of the Supreme Court of Puerto Rico in Part IV of its opinion (R. 28-31), and its conclusion in substance that the omission from Section 3 of the Jones Act of a specific provision empowering the insular legislature to impose duties on imports into Puerto Rico means that the Congress deliberately chose in that way to further indicate its original intention to withhold from Puerto Rico any exercise of that power, in harmony with the clearly implied reservation thereof to the Congress embodied in Section 2 of the Foraker Act. As the insular Supreme Court points out, the Congress, in Section 3 of the Jones Act, saw fit to prescribe specifically the general categories of taxes which the local legislature could impose, namely "taxes and assessments on property, internal revenue, and license fees, and royalties for franchises, privileges and concessions." The significant failure to include therein the other familiar category, "tariffs, customs or duties", considered in connection with the legislative policy enunciated in Section 2 of the Foraker

Act, already then previously adhered to for 15 years, and continued in effect by the Jones Act, compels the conclusion of the insular Supreme Court last above mentioned.

However, that conclusion finds still further support in the proviso added to Section 3 of the Jones Act, by Section 1 of the Butler Act of March 4, 1927 (44 Stat. 1418; App., *infra*, p. 47), for in that proviso the Congress again made no reference to tariffs, customs or duties, and took pains expressly to limit the special authorization thereby granted to a single one of the categories of taxes already specified in the preceding original text of the section, namely internal revenue taxes.

It should also be observed that the Congress in the various tariff acts enacted since the Foraker Act became a law, has made the customs duties prescribed thereby applicable to the United States and its possessions (with exceptions not pertinent here), thus including Puerto Rico within such application. See Title I of the Tariff Act of 1930, Section 1 (46 Stat. 590; 19 U. S. C. 1001). Likewise, the "Free List", Title II, Section 201 of the same Act (46 Stat. 672; 19 U. S. C. 1201), is introduced by provisions expressly exempting the listed articles from duty when imported into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, American Samoa and Guam).

And when Congress desired in 1927 to empower the insular legislature to impose local internal revenue (excise) taxes on imports, it did so by formal enactment of the Butler Act. Again, three years later, when it wished the insular legislature to have power to impose a local import duty on coffee, Congress did not trust to the taxing powers conferred upon the legislature by the original terms of the Organic Act, or even to the additional taxing powers granted by the Butler Act amendment to Section 3 of the Organic Act, but inserted in the Tariff Act of 1930 a new specific authorization to that end (46 Stat. 696, Sec. 319; 19 U. S. C. 1319). There could hardly be more definite evi-

dence of the understanding of Congress, even after its enactment of the Butler Act, that the explicit consent of that body was necessary to validate any local direct tax on imports, and its intent to maintain and enforce that principle.

These factors lead naturally and logically to the conclusion reached by the Supreme Court of Puerto Rico (R. 37), in substance, that even though the Import-Export Clause of the Constitution does not of its own force apply directly to Puerto Rico, nevertheless, Puerto Rico is forbidden by federal law to levy duties on imports, without the explicit consent of Congress, as effectively as if the Import-Export Clause had been expressly extended there. Apparently counsel for the respondent share that view, for they definitely conceded in their opening brief before the Court of Appeals that explicit Congressional consent was requisite to validate the insular duty on coffee, as well as the application of excise taxes to imports.

If that view is correct, and we find no authority whatever in opposition to it, it is logical to conclude also that the principles governing the determination as to when imports cease to be such with respect to Puerto Rico under Section 2 of the Foraker Act, are much the same as those for such determination with respect to a state under the Import-Export Clause of the Constitution, because the underlying reasons for the two restrictions, one statutory and the other constitutional, are substantially the same. And, of course, those principles do not admit of the view advanced by respondent in this connection, to the effect that this merchandise lost its status as imports under the Foraker Act when the ship carrying it entered the port of San Juan. That status certainly continued at least until customs release and discharge of cargo on or after January 18, 1943, three days or longer after the statutory assessment date.

Attention is invited to the obvious analogy pointed out in the opinion of the Supreme Court of Puerto Rico (R. 42-43), between established principles for determining when exports take on that status with respect to the constitu-

tional prohibition against states laying imposts or duties on exports, and those for determining when imports cease to be such under the similar constitutional restriction with respect to them. In that connection, the insular Supreme Court cites various cases holding in substance that articles become exports and exempt from state excise taxation after they have been loaded on a carrier for exportation to a foreign country, though noting as possibly *contra* the decision of the California Supreme Court in the case of *Richfield Oil Corp.* v. *State Board,* 163 P. (2d) 1 (1945). The insular Supreme Court reasons in substance that if a tax on an export is inhibited after it is loaded for shipment to a foreign country, it seems reasonable to say that a local tax on an import from a foreign country continues to be inhibited while the merchandise is still on the incoming vessel in the custody of customs officials (R. 43).*

The basic premise of this reasoning, to-wit, that the export achieves status and protection as such against state taxation as soon as it is loaded on a carrier for shipment abroad, is now even more firmly established by this Court's holding to that effect in its recent opinion reversing the *Richfield* case above mentioned. *Richfield Oil Corp.* v. *State Board,* 67 S. Ct. 156, decided November 25, 1946. Incidentally that decision also lends support to the reasoning by analogy between exports and imports adopted by the lower court in the case at bar, for this Court in striking down, as a violation of the Import-Export Clause of the Constitution, the state excise tax on exports involved in the *Rich-*

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* *Cf. Joseph* v. *Carter & Weekes Stevedoring Co.*, 67 S. Ct. 815, decided by this Court on March 10, 1947, holding a New York statute imposing a local tax upon gross receipts or upon privilege of conducting business of stevedoring for interstate or foreign commerce measured by those gross receipts, to be invalid as unduly burdening or interfering with commerce. Essential parts of the Court's reasoning in that case are (pp. 818, 821):

> "The transportation in commerce, at the least, begins with loading and ends with unloading." . . .
>
> "Stevedoring, we conclude, is essentially a part of the commerce itself." . . .

field case, employs similar reasoning by analogy, citing (p. 164) *Brown* v. *Maryland*, 12 Wheat, 419, in which certain state excise taxation of imports was held invalid for violation of the same clause of the Constitution.

It follows, we believe, that upon the date of assessment, the imports involved in this case, clearly must be held to have retained their distinctive status as "articles imported into Puerto Rico" within the meaning of Section 2 of the Foraker Act, and accordingly that the disputed exaction was forbidden by that act unless it is shown both first, that it was authorized by enactment of the insular legislature, and second, that such authorization was extended with the consent of the Congress.

Point II.

The Puerto Rican Legislature had never undertaken or attempted to authorize the application of the insular property tax to articles in course of importation, such application by the respondent in this case was wholly without the sanction of local law, and the judgment of the insular Supreme Court should have been affirmed on this ground.

The soundness of this proposition and its importance as a reason for granting certiorari, have already been sufficiently outlined in the foregoing petition under the heading: "Reasons for Allowance of the Writ", subheading: "The Local Law Question" (*supra*, pp. 6-9).

However, counsel for respondent may argue here, as they did below, that since the disputed exaction is literally authorized by the broad terms of Sections 285 and 297 of the insular Political Code of 1902, it must be held to have been within their intent under the principle of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644.

The error involved in attempting to apply that principle here is readily apparent.

In that case the Court was considering the validity of New Hampshire state legislation purporting to amend the

1769 charter of Dartmouth College, as against the objection that the state enactments violated the federal constitutional prohibition of state legislation impairing the obligation of contracts.

Holding the charter to be a contract, the Supreme Court declared the state legislation unconstitutional, overruling, among other arguments in its support, a contention that although within the literal terms of the constitutional inhibition, the peculiar nature of the charter took it outside the intended purview of the word "contract" as used in the Constitution.

It was in that connection that Mr. Chief Justice Marshall, in the majority opinion (4 Wheat. 644), said:

> "It is not enough to say that this particular case was not in the mind of the convention when the Article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."

There is, of course, no parallel whatever between that case and the one at bar. Here we are not dealing with a provision of the federal Constitution, but with a local Puerto Rican taxing statute, which, we contend and have shown, if construed at the time of its enactment as respondent desires, that is, to apply to imports, would to that extent have violated the Organic Act (Constitution) of Puero Rico.

It follows, we contend, that Sections 285 and 297 of the Political Code must be construed *ad initio* as inapplicable to imports. As official publications of the enactments of the insular legislature from 1902 to 1945 disclose no act of that

body purporting to change that construction, it must be deemed, at least for the purposes of this case, to have remained unchanged up to the present time. Since the Butler proviso grants power only to the legislature, does not even purport to authorize the Treasurer of Puerto Rico to do anything without the sanction of the legislature, and as there is no other statutory authority, either federal or local, for the disputed exaction, it is clearly invalid as a matter of local law.

Point III.

Section 3 of the Jones Act, as amended by the Butler Act, affords no authority whatever for imposition of the insular property tax on imports.

As indicated in the foregoing petition (*supra*, p. 10), the question involved in this point is simply whether the expression "internal revenue taxes," as employed in that part of Section 3 of the Jones Act which was added by the Butler Act, includes the insular property tax. The insular Supreme Court answered that question positively in the negative, reasoning substantially as follows (R. 35-36):

(1) In the original text of Section 3 of the Jones Act, as enacted in 1917, the Congress saw fit to specify the taxes the insular Legislature was authorized to impose, in separate categories, as follows:

> "Taxes and assessments on property, internal revenue, and license fees; and royalties."

(2) The distinction thus made by the Congress between property taxes and internal revenue taxes is binding on the courts; and

(3) When the Congress in 1927 added the Butler Act proviso to Section 3 of the Jones Act, authorizing application of "internal revenue taxes" to articles subject to those taxes as soon as brought into the island, that body had directly before it the original text of the section, and must

have used the quoted words in the sense of their previous employment in the original text; that is, in a sense obviously excluding the separately mentioned property tax.

Along the same line, it should be observed that the contrary theory of the respondent and the Circuit Court of Appeals to the effect that the Congress used the expression "internal revenue" in both the original text of Section 3 of the Jones Act and in the Butler proviso, in the broadest sense, as inclusive even of the there separately specified property taxes, as well as all other taxes except duties or imposts, is entirely inconsistent with the fact that by the same Butler Act the Congress expressly inserted "income taxes" among the several categories of taxes the insular legislature had been authorized by the original text of the section to impose. This shows again and very decisively that the Congress did not interpret "internal revenue" as used in the original text to be inclusive of all taxes other than taxes on imports, because such an interpretation would have included income taxes and would have thus made the insertion of an express designation of that separate category unnecessary.

In short, the theory on which the Circuit Court of Appeals rules that the term "Internal revenue" in Section 3 of the Jones Act, as amended by the Butler Act, includes the property tax, likewise separately specified therein, would also make that term inclusive of income taxes and every other category of taxes separately mentioned in the section, the specification of which, in that view, would become superfluous and ineffectual.

Such a theory clearly violates a rule of statutory construction which this Court has characterized as *cardinal*, namely that effect shall be given to every clause and part and word of a statute. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208, 52 S. Ct. 322, 76 L. Ed. 704, citing *Market Co.* v. *Hoffman*, 101 U. S. 112, 115 and *Ex parte Public National Bank*, 278 U. S. 101, 104.

Does the Court of Appeals suggest any reason for not applying that rule of construction in the present instance?

Is there anything in the purpose or context of the enactment that demands or even suggests that it should be construed so as to render some of its words meaningless? No, there is no such suggestion.

On the contrary, the Court of Appeals (R. 52-55) actually mentions several good reasons for believing its construction of Section 3 erroneous, dismissing them, however, as inconsequential, apparently because of an unwarranted conviction that the words "internal revenue" must always mean all taxes derived from internal sources, coupled with an equally erroneous belief that this Court so interpreted those words, as they appear in the statute under discussion, in *West India Oil Co.* v. *Domenech*, 311 U. S. 20 (R. 5-6).

In the case last mentioned the sole question presented was whether the sales taxes imposed by Sections 16(a) and 62 of the "Internal Revenue Law of Puerto Rico," *supra*, as amended by Act No. 17 of June 3, 1927, could be levied on oil brought into Puerto Rico from foreign countries and deposited in bond, when withdrawn and sold to ships at San Juan for use as fuel in transit to other ports. Thus the tax involved in that case was clearly an "internal revenue tax" within the meaning of Section 3 of the Jones Act, as amended by the Butler Act, and this Court properly upheld judgments of the insular Supreme Court and of the Circuit Court of Appeals, so holding, and sustaining the sales tax as applied in that case.

The distinction between that case and the present one is apparent at a glance. In that case there was no question that the sales tax there involved was an "internal revenue tax" within the meaning of the Butler Act, because it was one of the very taxes imposed by the "Internal Revenue Law" of the island; and in that case the status of the insular property tax as being or not being an "internal revenue tax" under the Butler Act was not at issue—indeed, was not discussed or even mentioned by this Court or any of the lower Courts. In the present case the precise federal question presented, if any federal question is properly involved at all, is whether the insular property tax is such an

"internal revenue tax." That question was not involved in the *West India Oil Company* case at all, directly or indirectly.

Nevertheless, it is apparent that the Circuit Court of Appeals rested its conclusion in this case very largely upon the opinion of this Court in that case. In the final part of its opinion that Court declares (R. 54):

> "And we think the Supreme Court must have interpreted the phrase as covering all taxes from internal sources, and hence all the taxes enumerated in the first sentence of Section 3 of the Jones Act, when in *West India Oil Co.* v. *Domenech*, 311 U. S. 20, 27, 28, it said that the 'plain purport' of the proviso added by Section 1 of the Butler Act 'is that *any* (emphasis supplied) tax authorized by the Organic Act with respect to articles of domestic production may likewise be levied with respect to imported articles 'as soon as . . . [they] . . . are manufactured, sold, used, or brought into the island'."

And after quoting further general expressions from the same opinion of this Court, the Circuit Court of Appeals again finally declares (R. 55):

> "From this language we conclude that even though the particular application of the insular general property tax to the appellee's merchandise may make that tax in its effect a duty or impost on imports, nevertheless it is a tax which Congress in the exercise of its plenary power in the premises has authorized the insular legislature to impose."

We have quoted thus extensively from the closing part of the opinion of the Circuit Court of Appeals, in order to show how strongly that Court relied upon general expressions employed by this Court in a case in which this Court was not called upon to decide or to consider at all the question involved here. Such an extension of the holding of this Court in the *West India Oil Co.* case, clearly violates a basic principle of the interpretation and application

of judicial precedents, not long since reaffirmed by this Court in the following language:

> " 'It is a maxim, not to be disregarded,' said Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 399, 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' " *O'Donohue* v. *United States,* 289 U. S. 516, 550.

Applying that maxim to the opinion of this Court in the *West India Oil Co.* case, bearing in mind that the particular tax involved there was a local sales tax, the nature of which as within the category of "internal revenue taxes" under Section 3 of the Jones Act, as amended, was obvious and was not in controversy, and considering also that the question involved here whether the insular propery tax is such an "internal revenue tax" was not presented or even mentioned in that case, the error of the Circuit Court of Appeals in relying so heavily upon that case to support its decision in this is strikingly manifest.

It seems to us that such action in itself affords very good ground for granting certiorari in this case. If we are right in our objection to the construction placed by the Circuit Court of Appeals upon the opinion of this Court in the *West India Oil Co.* case, surely that construction should not stand undisturbed. In any event the question whether, notwithstanding the maxim above cited, the general expressions in the opinion of this Court in that case are properly to be given full force and effect according to their broad literal terms, as construed by the Circuit Court of Appeals, is one of considerable importance, affecting the taxing

powers of the insular legislature, the rights of the Puerto Rican people, and the control of Congress over commerce between Puerto Rico and foreign countries. It is therefore a question that ought to be decided by this Court.

Among the grounds indicated by the insular Supreme Court in support of its construction of the Butler proviso, is the report submitted in identical language by both the Senate and House Committees, on the bill which became the Butler Act, quoted by the insular Supreme Court in Note 20 (R. 33-34), and by the Circuit Court of Appeals in Note 3 (R. 52).

As already stated, the Circuit Court of Appeals conceded that this legislative history gives some support to that construction (R. 54). The point is stronger than might appear at first glance.

It must be observed that the whole tenor of the report, with its failure to mention the property tax at all, its repeated references to internal revenue taxes, and particularly its reference to the difficulties of applying such taxes to articles sent into Puerto Rico by mail, or water transport, including the lack of authority of the postal and customs officials to withhold delivery of such articles until the insular tax is paid, is wholly inapposite to the insular property tax, assessed on January 15 each year, payable by installments beginning six months later, involving no lien and no apparent need of restriction on deliveries of goods in transit pending payment of the tax.

Obviously the Congressional Committees were not thinking of the property tax at all when they wrote that report, a presumption more fully borne out by the relation between the Butler Act and certain cognate acts of the insular legislature discussed next below.

The Legislature of Puerto Rico, in its many enactments relating to "internal revenue," has never evinced the slightest intimation that it considered that term to be inclusive of the insular property tax.

Less than two years prior to the enactment by Congress of the Butler Act, adding the proviso in question to Section

3 of the Jones Act, all of the then current laws of Puerto Rico expressly relating to internal revenue or to taxes ordinarily in Puerto Rico considered within that category, had been revised, recodified and embodied in a single act, namely, Act No. 85 of August 20, 1925 (Laws of Puerto Rico, 1925, pp. 584 *et seq.*), providing in Section 1 that the act should be known as the "Internal Revenue Law of Puerto Rico."

The enactment imposed only excise taxes on the manufacture, sale, use or consumption of various articles, together with certain occupational license fees, and made no mention of the annual direct property tax here involved.

Excepting the subsequent extension of some of the excises to "introduction into Puerto Rico," in 1927 (*infra*, p. 32) and later, this has always since continued to be and is now true of the "Internal Revenue Law of Puerto Rico," which still imposes only excise taxes and license fees, and contains no reference to the direct property tax.

A helpful sidelight is thrown on the meaning and scope of the proviso added to Section 3 of the Jones Act by the Butler Act of 1927, by the fact that in the original "Internal Revenue Law of Puerto Rico" (Act No. 85 of August 20, 1925), the island legislature both (1) clearly indicated its desire to apply the excise taxes imposed by that enactment to imports into the island from the United States and from foreign countries, and (2) tacitly but clearly recognized its lack at that time of power under the Organic Act to do so, by including in Part II, Title VII, under the heading of "Final Provisions," a section as follows (Laws of P. R., 1925, p. 660):

> "Section 109. From and after the date on which the Congress of the United States ratifies this section, there shall be levied and collected by the Treasurer of Porto Rico on all articles enumerated in Section 16 of this Act, imported into Porto Rico from any state, territory or district of the United States or from foreign countries, the same tax established by this Act for the manufacture or use of said articles or for dealing therein. Said tax shall be paid at the time of the importation of

said articles which shall not be delivered to the consignee thereof until the payment of the tax, established in this section shall have been proven. Upon such payment the imported articles shall be exempt from all tax for the use thereof or for dealing therein."

Considering that copies of all acts of the Puerto Rican Legislature are required by Section 23 of the Organic Act (39 Stat. 958; 48 U. S. C. 842) to be transmitted to the Congress promptly after enactment, and that the resulting enactment by the Congress of the Butler Act on March 4, 1927, followed by only about 18 months the enactment of the "Internal Revenue Laws of Puerto Rico" on August 20, 1925, containing the section last quoted, it is logical to conclude that the Butler proviso constituted the response of the Congress to the desire of the insular legislature for ratification of the said Section 109, the Congress, however, preferring not to grant such ratification in express terms but to embody the requested power in Section 3 of the Organic Act, as was done by the Butler Act.

These considerations make it manifest that by the phrase "internal-revenue taxes levied by the Legislature of Porto Rico," as employed in the Butler proviso, the Congress meant to refer only to taxes of the kinds then imposed by the "Internal Revenue Law of Puerto Rico," and taxes of like categories that might thereafter be validly imposed by the Puerto Rican Legislature, namely excise taxes and license fees, because such were the only taxes the island government had then designated as internal revenue taxes and the only taxes that government was then seeking authority to apply with relation to articles brought into the island from either the United States or foreign countries. There was no occasion for the use in the Butler proviso, or in the Congressional Committee reports relating thereto, of the term "Internal-revenue taxes" in any broader sense than that in which it was employed in the Puerto Rican "Internal Revenue Law." More certainly there was no occasion for its use in that proviso in the very loose sense

now urged by the appellant, as comprehending the general annual property tax in question here, a tax created by provisions of the local Political Code, a tax that is not mentioned in the "Internal Revenue Law of Puerto Rico," and a tax that is expressly mentioned, along with internal revenue, among the categories of taxes the insular legislature was authorized by Section 3 of the Jones Act to impose.

That the Legislature of Puerto Rico understood the meaning and effect of the Butler proviso to be as it is construed in the opinion of the Supreme Court of Puerto Rico in this case, and as petitioner contends it should be construed, is demonstrated beyond reasonable doubt by the legislature's reaction to the enactment of that proviso. Convened in special session on April 25, 1927, the legislature promptly proceeded to utilize the new authorization by enacting Act No. 17, approved by the Governor May 25, 1927, amending Act No. 85 of August 20, 1925 ("Internal Revenue Law of Puerto Rico"), by extending many of the excises originally thereby prescribed only for manufacture, sale, use or consumption of various articles, so as to make the excises apply also to introduction of the articles into Puerto Rico (Laws of P. R., 1927, pp. 458 *et seq.*).

No corresponding change was made then or at any time thereafter (at least up to the close of the regular session of 1945) in the general property tax provisions of the Political Code, although these apparently had never up to that time been construed or asserted by the Government to be applicable to imports into Puerto Rico, whether from the United States or elsewhere. The present case is the first to reach the Supreme Court of Purto Rico disclosing any attempt on the part of the Treasurer of Puerto Rico to collect the property tax upon imports from a foreign country.

And, in 1931, the island legislature gave still further evidence of its understanding that the authority extended by the Butler proviso related only to internal revenue taxation of the categories imposed by the "Internal Revenue Law of Porto Rico," when, by Act No. 83, approved May 6, 1931 (Laws of P. R. 1931, pp. 504 *et seq.*), it further

amended Act No. 85 of 1925 in numerous particulars, including a change particularly significant in this connection, in the wording of the above quoted Section 109, making it read as follows (Laws of P. R., 1931, p. 524; emphasis supplied):

> "Section 109. From and after the date on which this Act is approved, and in pursuance of the authority granted under section 3 of the Organic Act, as amended by Act of Congress approved March 4, 1927, *internal revenue taxes may be collected on articles, goods, wares, or merchandise subject to taxation under this Law, as soon as the same are manufactured, sold, used or brought into the Island; Provided,* That no discrimination shall be made between articles imported from the United States or foreign countries, and similar articles produced or manufactured in Porto Rico."

As there has apparently been no corresponding change in the Political Code provisions establishing the annual general property tax, it is perfectly obvious that the island legislature has never considered the Butler proviso applicable to that tax.

Before the Circuit Court of Appeals, in reply to our argument that the legislative history of the Butler proviso, and the immediately preceding and succeeding related acts in the insular legislature, support the conclusion of the insular Supreme Court that the property tax is not an internal revenue tax under that proviso, respondent marshalled the early history of internal revenue in the United States, quoted from the Federalist and other ancient texts, referred to the direct property taxes imposed as internal revenue by Congress in the early years of our Nation, and cited the famous *Pollock Case* of 1895 (*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429), in which this Court held the federal income tax act of 1894 unconstitutional upon the ground, among others, that it taxed property directly without apportionment.

Such considerations afford no logical answer to the reasons assigned by the insular Supreme Court, or those ad-

vanced herein, for construing the term "internal revenue", as used in Section 3 of the Jones Act, in its original text as well as in the Butler proviso, to be exclusive of the insular direct property tax. At the time of the enactment of the Jones Act in 1917, there had been no federal direct property tax for more than fifty years, and it is common knowledge that for a like period the term "internal revenue" as employed with relation to federal taxation in the United States had borne no connotation or suggestion of direct property assessment and taxation in any customary use or understanding of the term.

It was no doubt for that very reason in part that the Congress in formulating the original text of Section 3 of the Jones Act, thought it necessary to specify and did specify as separate categories, both "taxes and assessments on property" and "internal revenue".

Nor does the term "income taxes" embrace any suggestion of the ordinary direct assessment and taxation of property. True this Court in the *Pollock case, supra*, held that the proposed income tax there under consideration, was in part a direct property tax within the meaning of the constitutional provision requiring apportionment of direct taxes. And we concede that the present federal income tax is imposed by statutes that are part of the federal Internal Revenue Code.

However, when the Congress in 1927 desired to assure authority to Puerto Rico to enact a local income tax law, that body did not rely on the term "internal revenue" already in Section 3 of the Jones Act, but expressly amended the original text of that section by inserting therein the words "income taxes." And Congress did this in the very same Butler Act by which was added to that same section the proviso authorizing extension of insular internal revenue taxes to imports.

Respondent has also argued that some support for his desired broad interpretations of "internal revenue" in the Jones and Butler Acts, is afforded by the fact that in the Political Code of 1902, provision was made for the assessment and collection of the property tax by employees called

"internal revenue agents". From that fact respondent concludes in substance that the insular legislature has always understood the property tax to be within the meaning of "internal revenue". The *non sequitur* is obvious. The insular Treasurer was being made responsible for the collection of all of the taxes originally imposed by the Code, namely, property, excise and license. Some common designation of the employes to be used in that function was convenient in prescribing their general powers and duties. The legislature chose "internal revenue agents", but that did not necessarily characterize all of the taxes to be collected as technically within the meaning of the term "internal revenue taxes". Indeed, the Political Code makes no use of that term at all.

It is also significant that Section 287 of the same Political Code makes special provision for separate bureaus in the office of the Treasurer, one for property taxes and another for excise taxes; and that Section 289 provides that the internal revenue agents charged with the duty of assessing or revising the assessment of property are to be known as "assessors" (App., *infra*, pp. 49-50).

Note also that in the early island budgets, the list of employees of the Treasurer's Bureau of Property Taxes included no internal revenue agents described as such, but included clerks and assessors invested with "all powers conferred upon internal revenue agents" (Act No. 16, March 13, 1913, L. of P. R. 1913, pp. 165, 168).

It was not until more than 20 years after enactment of the Political Code, in Act No. 85 of 1925, *supra*, that the insular legislature initiated any use of the term "internal revenue" to describe categories of insular taxes, and when it did so, it did not include thereunder the property tax in question here, but included only excise and license taxes.

Among the suggestions advanced below by respondent, to support his contention that "internal revenue taxes" as employed in the Butler proviso should be interpreted as comprehending the property tax in question, was one to the effect that the Congress, in the original Section 3 of

the Jones Act, deliberately used the terms specifying the authorized categories of taxes in overlapping senses.

Pursued to its logical conclusion, that argument amounts to saying that the words "taxes and assessments on property" as they appear in the original text of Section 3 are superfluous—that they add nothing to the intended sense and force of the statute, and could have been omitted without affecting the result, for as respondent contends, their whole significance was comprehended in the adjoining words of the enactment, "internal revenue taxes".

But this suggestion collides with elementary rules of statutory construction already noted (*supra*, p. 25). Courts do not disregard as meaningless any word or phrase of a statute if there is any alternative construction by which the word or phrase can be given appropriate force and effect in harmony with the whole enactment.

And here there is an obvious and reasonable alternative, wholly consistent with the purposes of the Jones and Butler Acts, namely that the Congress meant in the original Section 3 of the Jones Act to recognize and specify taxes and assessments on property as a separate category of taxation, because not then comprehended within the term "internal revenue taxes", either in actual practice in the United States where there had then been no such federal property tax for over 50 years, or in Puerto Rico, where the term "internal revenue" had then recently been expressly appropriated and utilized by the legislature in Act No. 85 of 1925, *supra*, the short titled "Internal Revenue Law of Puerto Rico", to describe excise and license taxation exclusively.

It follows, we believe, that the insular Supreme Court is unquestionably right in its view that the Butler proviso in question relates only to internal revenue taxes in the usual local acceptance of the term as employed in Puerto Rican laws, and provides no authority whatever for application of the annual property tax to imports still aboard the importing ship awaiting customs clearance on the assessment day.

Point IV.

The disputed tax, as applied by the Treasurer in this case, is a direct charge on importations into Puerto Rico from a foreign country. As such, it amounts in operation and practical effect to a local tariff or customs duty, positively forbidden by Section 2 of the Foraker Act.

Even the internal revenue taxes imposed by federal statutes upon imported merchandise after payment of the customs duties laid by the United States tariff laws, but while the merchandise retains its distinctive character as an import, are held by the United States Court of Customs and Patent Appeals to be customs duties within the meaning of international reciprocal trade agreements of the United States providing for preferential reductions in duties on certain categories of articles. *Faber, Coe & Gregg* v. *United States*, 97 F. (2d) 115, 116.

In *Richfield Oil Corporation* v. *State Board*, 67 S. Ct. 156, *supra*, the State of California had assessed a general excise tax against *Richfield* upon a sale of California-produced oil and its delivery aboard a vessel at the port of Los Angeles, California, for shipment to the purchaser at Auckland, New Zealand.

Reversing a judgment of the Supreme Court of California upholding the tax as thus applied, this Court declared the tax unconstitutional under Article I, Section 10, Clause 2, of the federal Constitution, commonly known as the Import-Export Clause.

Among the arguments advanced in that case in support of the validity of the tax was, as respondent argued below in this case, that the tax should be upheld because it was non-discriminatory, but this Court rejected that theory, as an attempt to write into the absolute prohibition of the Import-Export Clause an exception not warranted by its language or intent (67 S. Ct. pp. 160-161).

The same principle logically applies to the non-discriminatory argument in this case, for that argument likewise

amounts to an attempt to write into the unqualified prohibition against local customs duties on imports necessarily implied in Section 2 of the Foraker Act, an exception wholly unwarranted by the words or purpose of that statute, in favor of the direct application of a local property tax to imports into Puerto Rico if the tax does not discriminate between such imports and other property.

In the *Richfield* case, it was also argued that the tax was good as there applied, because it accrued upon delivery of the oil into the exporting vessel, and therefore, as it was contended, before the actual process of exportation had begun, i.e., before the oil became an export. This contention also was overruled by this Court. Citing with approval its prior holdings in *Spalding & Bros.* v. *Edwards*, 262 U. S. 66, 43 S. Ct. 485, 67 L. Ed. 865, and *Willcuts* v. *Bunn*, 282 U. S. 216, 51 S. Ct. 125, 75 L. Ed. 304, this Court held, in substance (67 S. Ct. 162-163), that articles become exports and as such exempt from taxation not later than their delivery to a carrier for exportation, and pointed out that in the mentioned *Willcuts* case the constitutional prohibition against federal taxation of exports had been so construed as to give immunity not only to the process of exportation but also to the transactions and documents embraced in that process, the Court having declared that only on that construction could the constitutional safeguard be maintained.

In view of the obvious analogy, pointed out by the insular Supreme Court, between the factors and principles affecting the determination of when articles shipped to foreign countries first become exports under the Import-Export Clause, and those to be considered in the corresponding determination as to when incoming articles cease to be imports under that clause, as well as the further analogy to which we have already referred between the express prohibition of the Import-Export Clause, and the implied but no less positive prohibition of Section 2 of the Foraker Act, it is manifest that the holdings of this Court in the *Richfield* case logically apply in principle here.

It follows that the argument of respondent to the effect that on the date of the assessment in question here, January 15, 1943, while the assessed property still lay aboard the importing ship in United States customs custody, its importation was complete, and its characteristic identity as imports within the purview of Section 2 of the Foraker Act had ceased, crashes head on against the principles so recently reaffirmed and followed by this Court in the analogous *Richfield* case.

Moreover, and finally as far as concerns this Court's opinion in the *Richfield* case, that opinion in effect nullifies all of the other various and ingenious arguments thus far advanced by the respondent in this case in the effort to distinguish the disputed exaction from a customs duty, and thus to save it from conflict with Section 2 of the Foraker Act. In that case, referring to holdings of the California Supreme Court in the same case that the tax there involved was an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales, that it was not laid on the consumer and did not become a tax on the sale or because of the sale, this Court, while recognizing these constructions of the state taxing act to be matters of state law and thus binding on the federal Supreme Court, declared they were not determinative of the question whether the tax deprived the taxpayer of a federal right, pointed out that that question turns not on the characterization which the state has given the tax, but on its operation and effect, and after further discussion of the reasons for its conclusions, closed as follows (67 S. Ct. 164):

> "We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional."

In the present case the application of the basic principles of the *Richfield* case is even clearer than in that case, for the disputed tax involved here has been applied directly

to the imports themselves, and is thus in every essential particular of operation or effect upon import, importation or importer, indistinguishable from a customs duty assessed at the port of entry.

The fact that in its general terms and application the tax is, as appellant contends, the widely used and conventional ad valorem annual general property tax, does not alter the fact that, as it is sought to be applied here, it operates precisely as if it were a tariff, custom or duty, imposed by local authority, in addition to such, if any, as are in force with relation to similar imports under federal tariff laws.

Nor is such operation and effect modified in the slightest degree by any of the several other distinctions suggested by respondent, namely, (1) that the local taxing statute and its application as proposed in this case would involve no discrimination between imported property within a Puerto Rican harbor not yet unladen or released from customs, and other property within the island, (2) that the tax is for a fiscal year beginning months after the assessment date, and (3) that the tax is not immediately payable and imposes no immediate lien on the property assessed. These considerations all leave unchanged the basic fact that the tax, as sought to be applied here, is a direct and added expense of importation charged against the importer on the assessment day when the articles assessed were in the harbor of San Juan, Puerto Rico, but still in cargo aboard the carrying vessel and in the official custody and control of federal customs authorities.

The holding of the insular Supreme Court, in Part I of the opinion (R. 18-20), to the effect that the tax in question, as sought to be applied here, is not barred by the due process clause of Section 2 of the Organic Act, of course, is qualified by Justice Snyder's use of the word "alone" in his statement toward the end of that part of the opinion (R. 20), to the effect that so far as the due process clause *alone* is concerned, the only barrier against taxation by Puerto Rico of tangibles belonging to its domiciliaries is permanent location of the property elsewhere, and by the

ultimate holdings of the opinion that the tax as applied in this case violates other provisions of the Organic Act. If the tax as so applied violates other provisions of the Organic Act, then it is certainly lacking in due process and thus also constitutes a taking of property without due process in violation of the due process clause of that act.

Respondent will no doubt argue here, as he did below, that the decision of the Supreme Court of Puerto Rico results in discrimination against articles brought into Puerto Rico from the United States and in favor of those brought into the island from foreign countries, and that this consideration affords support for his contention that the Butler proviso should be construed to authorize application of the property tax to imports; but that argument is singularly lacking in substance.

As pointed out by the insular Supreme Court, the exemption of imports from the property tax is in most instances more than offset by their subjection to the federal tariff, a much more considerable burden not borne by articles arriving in Puerto Rico from the United States, excepting coffee.

Although the Supreme Court of Puerto Rico does not predicate its final conclusion (that the disputed tax is invalid) directly upon the Import-Export Clause of the Federal Constitution, it does point out in Part III of its opinion (R. 24-27), (1) that from the early case of *Brown* v. *Maryland*, 12 Wheat 419, to the recent decision in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, the rule has been that under that clause the immunity of imports from state taxation survives their arrival in this country and continues until they are sold, removed from the original package, or put to use; (2) that none of these three events had taken place in this case on the assessment date; (3) that the Circuit Court of Appeals, in *Porto Rico Tax Appeals*, 16 F. 2d 545, 549, ruled positively, in January, 1927, that the right of Puerto Rico to tax the sales of foreign importations was not greater than that of the states; and (4) that the insular Supreme Court had held to the same effect in July, 1926, in *Panzardi* v. *Gallardo*, 35 P. R. R. 869, 872.

True the decisions last above mentioned antedate the enactment of the Butler Act on March 4, 1927, but unless that act is construed to authorize the imposition upon imports of the local property tax in question, as distinguished from internal revenue taxes, the force and bearing of those decisions remain unaffected with relation to the issues in this case. Obviously those decisions were predicated upon views that the effect of Section 2 of the Foraker Act upon the Puerto Rican taxing powers was substantially equivalent to the effect of the Import-Export Clause upon the taxing powers of the states, and accordingly, that the principles of *Brown* v. *Maryland, supra,* governed in determining the validity of insular taxation affecting importations.

As we believe the reasons given by the insular Supreme Court, and those hereinabove suggested, against a construction of the Butler Act proviso as comprehending such a tax as that in controversy here, are unanswerable, it follows in our opinion that the holding of the Circuit Court of Appeals in *Porto Rico Tax Appeals, supra,* was and still is sound, that the explicit consent of Congress necessary to validate the application of the insular property tax to imports is wholly lacking, and accordingly that this Court should grant this petition and reverse the judgment of the Circuit Court of Appeals.

Point V.

At most, the reasoning set forth in the opinion of the Circuit Court of Appeals in support of the disputed exaction leaves obvious and substantial doubts of its validity, which doubts should be resolved in favor of the taxpayer under principles governing the construction of taxing statutes.

The Circuit Court of Appeals concedes that at first glance the phraseology of Section 3 of the Jones Act, as originally enacted, might suggest the implications (1) that absent the Butler Act, the insular legislature would lack power to tax imported goods while in the original package, and (2) that

Congress intended the phrase "internal revenue taxes" in the Butler Act proviso to describe a narrower classification of taxes than the quoted words would, according to the view of that Court, literally denote. That Court also concedes that the legislative history quoted in Footnote 3 of its opinion gives some support to those implications (R. 4-5).

Nevertheless that Court reasons that the words "internal revenue taxes" are used to describe any tax which a government may impose, except duties on imports; or, in other words, all taxes derived from internal sources; and that this Court so interpeted them as they appear in the Butler proviso in question here, in the *West India Oil Co.* case, *supra*.

Substantial doubts of the soundness of that theory arise from the mere statement of it, upon a superficial examination of the statutes involved, and of the case cited. Those doubts are enhanced by consideration of the contrary reasoning and conclusion of the insular Supreme Court, and of the matters set forth under Point III of this brief (*Supra*, pp. 24-36).

Additional and substantial doubts of the propriety of the judgment of the Circuit Court of Appeals arise from the failure of that Court to discuss or even mention the very pertinent Section 2 of the Foraker Act, or the question of local law presented (Petition, *supra*, pp. 6-9, and Point II, *supra*, pp. 22-24).

All of the statutes directly involved, both federal and local, insofar as they relate to the issues presented, are taxing statutes; that is, statutes affecting the imposition, levy and collection of taxes in Puerto Rico.

Doubts as to the proper construction of such statutes are resolved in favor of the taxpayer. *United States* v. *Merriam*, 263 U. S. 179, 187-188; *Reinecke* v. *Trust Co.*, 278 U. S. 339, 348; *Porto Rico Brokerage Co.* v. *United States*, 76 F. 2d 605, 611.

Accordingly this point provides another good reason for allowance of the writ and reversal of the judgment of the Circuit Court of Appeals.

CONCLUSION.

There are special and important reasons for allowing the writ sought, the petition should be granted, and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Date: September 20, 1947.

APPENDIX.

CONSTITUTION OF THE UNITED STATES

Import-Export Clause

(Art. I, Sec. 10, Cl. 2)

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

FEDERAL STATUTES

Foraker Act

(First Organic Act for Puerto Rico, approved April 12, 1900, c. 191, 27 Stat. 77, as amended with relation to spelling of Puerto Rico by Act of May 17, 1932, c. 190, 47 Stat. 158.)

Sec. 2. That on and after the passage of this Act the same tariffs, customs and duties shall be levied, collected, and paid upon all articles imported into Puerto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries . . . (48 U. S. C. 739).

Sec. 3. . . . *Provided*, that . . . in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Puerto Rico from the United States or coming into the United States from Puerto Rico (48 U. S. C. 738).

Sec. 4. That the duties and taxes collected in Puerto Rico in pursuance of this act, less the cost of collecting the

same, and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Puerto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Puerto Rico until the government of Puerto Rico herein provided for shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Puerto Rico, and the Secretary of the Treasury shall designate the several ports and subports of entry in Puerto Rico and shall make such rules and regulations and appoint such agents as may be necessary to collect the duties and taxes authorized to be levied, collected, and paid in Puerto Rico by the provisions of this act, and he shall fix the compensation and provide for the payment thereof of all such officers, agents, and assistants as he may find it necessary to employ to carry out the provisions hereof: *Provided, however,* That as soon as a civil government for Puerto Rico shall have been organized in accordance with the provisions of this act and notice thereof shall have been given to the President he shall make proclamation thereof, and thereafter all collections of duties and taxes in Puerto Rico under the provisions of this act shall be paid into the treasury of Puerto Rico, to be expended as required by law for the government and benefit thereof instead of being paid into the Treasury of the United States (48 U. S. C. 740).

Jones Act

(Second and now current Organic Act of Puerto Rico, approved March 2, 1917, c. 145, 39 Stat. 951, as amended with relation to spelling of Puerto Rico by the act of May 17, 1932, c. 190, 47 Stat. 158.)

Sec. 2. That no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property

without due process of law, or deny to any person therein the equal protection of the laws. . . . (48 U. S. C. 737).

Sec. 3. That no export duties shall be levied or collected on exports from Puerto Rico, but taxes and assessments on property, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Puerto Rico; . . . (48 U. S. C. 741).

Section 3 as amended by Section 1 of the (Butler) Act of March 4, 1927, 44 Stat. 1418, showing original text in roman type and additions in italics.

Sec. 3. That no export duties shall be levied or collected on exports from Puerto Rico, but taxes and assessments on property, *income taxes,* internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Puerto Rico; . . . (48 U. S. C. 741).

And it is further provided, That the internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used or brought into the island: Provided, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Puerto Rican government in the collection of these taxes (48 U. S. C. 741a).

Sec. 37. That the legislative authority herein provided shall extend to all matters of a legislative character not

locally inapplicable, including power to create, consolidate, and reorganize the municipalities so far as may be necessary, and to provide and repeal laws and ordinances therefor; also the power to alter, amend, modify, or repeal any or all laws and ordinances of every character now in force in Puerto Rico or municipality or district thereof in so far as such alteration, amendment, modification, or repeal may be consistent with the provisions of this Act. . . . (48 U. S. C. 821).

Sec. 58. That all laws or parts of laws applicable to Puerto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Puerto Rico prescribed by the Act of Congress entitled "An Act temporarily to provide revenues and a civil government for Puerto Rico, and for other purposes," approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

PUERTO RICAN STATUTES

Political Code of Puerto Rico

Enacted March 1, 1902

(As set forth in the "Compilation of the Revised Statutes and Codes of Puerto Rico in force on March 9, 1911," Senate Document No. 813, 61st Congress, 3rd Session, pages 549 *et seq.*)

TITLE IX

CHAPTER I—ASSESSMENT OF PROPERTY

Sec. 285. (*Repealed by implication by the following section of an act approved Mar. 12, 1908, p. 187.*)

Section 1. That for and during the fiscal year beginning the first day of July, nineteen hundred and eight, and ending the thirtieth day of June, nineteen hundred and nine,

and in every succeeding fiscal year, unless otherwise provided by the Legislative Assembly of Porto Rico, there shall be levied and collected for the purpose of providing Insular and municipal revenue, by the Insular Government, a tax of ten one-hundredths of one per cent and by the municipalities a tax of not exceeding ninety one-hundredths of one per cent upon the value of all real and personal property in Porto Rico, and of all personal property of persons residing in Puerto Rico, to be ascertained as hereinafter provided, not hereinafter exempted from taxation.
* * * *

Sec. 286. That it shall be the duty of the Treasurer of Porto Rico to make a revision of the assessment of property in Porto Rico, for purposes of taxation, and to assess all property subject to taxation not heretofore assessed, as need for such revision and assessment arises. Such revision of assessments and the assessment of property not heretofore assessed shall be made solely in accordance with the provisions of this Title.

Sec. 287. (*As amended by act of Mar. 14, 1907, p. 330.*) That for the purpose of directing the work of the assessment of property, the preparation of the tax-rolls and tax-receipts corresponding thereto, and the collection of the taxes provided for in Chapters one and three of this Title, there shall be in the office of the Treasurer a chief of the bureau of property taxes, who, in addition to the duties and powers elsewhere conferred upon him, shall have all the powers conferred upon internal revenue agents and upon assessors; and, for the purpose of inspecting and enforcing the payment of taxes provided for in Chapter two of this Title there shall be in the office of the Treasurer a chief of the bureau of excise taxes, who, in addition to the duties and powers elsewhere conferred upon him, shall have all the powers conferred upon internal revenue agents and upon assessors.
* * * * * * * * * *

Sec. 289. (*As amended by acts of Mar. 10, 1904, p. 169, and Mar. 14, 1907, p. 362.*) * * * The work of the revision

of assessment and the assessment of property not heretofore assessed shall be done by the internal revenue agents provided for by this Title who shall be detailed for such duty by the Treasurer, and when so detailed such agents shall be known as assessors and shall have and exercise the powers conferred in this Title upon officers designated as assessors; and whenever the term assessors is used in this Title, or in any regulations, schedules or forms issued in compliance with this Title, reference is had to internal revenue agents designated to act as such assessors. * * *

* * * * * * * * * *

Sec. 293. Commission merchants and all persons dealing and trading on commission, assignees authorized to sell, and persons having in their possession property belonging to another, subject to taxation in the assessment district where said property is found, shall, for purposes of taxation be deemed the owners of the property in their possession.

* * * * * * * * * *

Sec. 297. (*As amended by act of Sept. 3, 1910, p. 37.*) That all personal property within or without Porto Rico shall be assessed to the owner thereof in the municipality in which he resides on the fifteenth day of January, except that such personal property as goods, wares, merchandise, and other stock-in-trade; machinery employed in any branch of manufacturing or business, including machines leased or operated under a stipulation providing for the payment of a royalty, horses and other livestock, and all other personal property having a permanent location within a municipality shall be assessed to the owner in the municipality in which it is thus situated and that shares of banks doing business in Porto Rico shall be assessed to their owners in the municipality where the banks are situated, as hereinafter provided.

Certified Copy of Point III, Brief for Appellee before the Circuit Court of Appeals.

CERTIFICATE.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the following is a true copy of an extract from the Brief for the appellee, appearing on pages 15 and 16 thereof, filed on May 15, 1947, and submitted at the hearing on June 10, 1947, in the cause in said Court numbered and entitled,

(Seal) United States Circuit Court of Appeals, First Circuit

No. 4233,

RAFAEL BUSCAGLIA, Treasurer,
Intervenor, Appellant,

v.

BALLESTER HERMANOS,
Petitioner, Appellee.

POINT III.

The Treasurer lacks authority of local law to impose the disputed tax as he seeks to do in this case.

It is no answer to the argument under Point II above to suggest that the legislature may have deemed the broad terms of the general annual property taxing provisions of the Political Code adequate as they stood to sanction their application by the Treasurer, after enactment of the Butler Act, to imports from the states or foreign countries, without need of further local legislation to that end.

The Butler Act did not amend or even purport to amend any local taxing act, or of its own force to empower the Treasurer of Puerto Rico to collect any tax. The Butler Act merely authorized the legislature to make provisions for application and collection of local internal revenue taxes on imports as soon as brought into the island.

Even if that authorization were stretched by interpretation as appellant advocates, to include authority to apply a local general property tax to imports in Puerto Rican harbors while on board ship unreleased from federal customs control, and the legislature had desired to take advantage of that authority, it would still have been necessary for the legislature to do so by appropriate enactment so providing.

The old provisions of the Political Code prescribing the tax, although literally broad enough to do so, had never been construed to authorize application of the property tax to imports; and could not have been so construed because of the controls over tariffs, customs and duties reserved to Congress by Sections 2 and 3 of the Foraker Act. In short, the general property taxing provisions of the Political Code were not intended at the time of their enactment to authorize the application of that tax to imports from any source, could not have been construed to intend such application because this would have involved a direct isolation of Section 2 or Section 3 of the original (Foraker) Organic Act of 1900, and it manifestly would have required an act of the Congress or the legislature to change the established meaning and effect of the Political Code in that respect, a measure which has never to this day been enacted.

It follows, as above stated, that even if the Butler Act were given the exceptionally loose and broad interpretation urged by the appellant, the Treasurer of Puerto Rico would still, as a matter of local law, be without legal power to enforce the disputed exaction.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Circuit Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit this twenty-first day of August, A. D. 1947.

ARTHUR I. CHARRON,
Clerk.

(Seal)

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 360

BALLESTER HERMANOS, PETITIONER

v.

RAFAEL BUSCAGLIA, TREASURER OF PUERTO RICO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of Puerto Rico (R. 5–16) and the opinion of the Supreme Court of Puerto Rico (R. 17–43) are contained in the record in English translation. The opinion of the insular Tax Court is not yet reported; the opinion of the insular Supreme Court is reported in 66 P. R. R. 560 (Spanish edition). The opinion of the Circuit Court of Appeals (R. 50–55) is reported in 162 F. 2d 805.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 17, 1947. (R. 55.) The

petition for a writ of certiorari was filed on September 22, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does Puerto Rico have the power to impose a property tax on imported merchandise which on the assessment date was on a foreign ship in San Juan harbor and had not yet been released to the importer by the customs authorities?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved are set forth in the Appendix, *infra*, pp. 13–17.

STATEMENT

Taxpayer, Ballester Hermanos, is an entity domestic to Puerto Rico, being a *sociedad mercantil* organized under the laws of Puerto Rico (R. 19) with its main office at San Juan. Taxpayer imported into Puerto Rico from Argentina merchandise valued at $118,250, which arrrived in the port of San Juan on January 13, 1943, in an Argentine ship. The Treasurer of Puerto Rico demanded payment of the general *ad valorem* property tax in the amount of $3,382.12, for the fiscal year 1943–1944 on this merchandise, assessed on January 15, 1943. Taxpayer contested this claim in the Tax Court of

Puerto Rico, where the parties stipulated that taxpayer "had guaranteed payment for the merchandise" and "had accepted drafts in payment for part of the merchandise prior to January 15 * * * but that it could not be unloaded due to customs proceedings until * * * the customs authorities gave the release pursuant to Federal laws * * * on January 18 or 20, 1943." (R. 17.)

There is no dispute that taxpayer owned the merchandise (R. 50) or that it was destined to become, as in fact it later became, a part of the permanent mass of property in the island (R. 51).

The Tax Court sustained the assessment (R. 5–16); the tax was paid under protest (R. 3) and the case was brought to the insular Supreme Court on certiorari to review the decision of the Tax Court in favor of the Treasurer (R. 1–5, 17). The insular Supreme Court reversed the order of the insular Tax Court for reasons set forth in its opinion (R. 17–43) and remanded the case with instructions to enter an order in favor of taxpayer (R. 43–44). Upon the Treasurer's appeal, however, the court below reversed the insular Supreme Court on the ground that Congress in the exercise of its plenary power in the premises had by statute authorized the insular legislature to impose the tax. (R. 50–55.)

ARGUMENT

1. No question of local law is involved. Taxpayer's contention in its petition (pp. 5, 6–9) and its brief (pp. 22–24), that there is here presented a question as to whether or not the insular taxing statute meant to authorize the tax imposed, has no basis in the record. Neither the insular Tax Court nor Supreme Court doubted that the local statute imposed the tax; they differed only on the issue of whether or not, construing a federal statute (Organic Act, Section 3, Appendix, *infra*, pp. 13–14), Congress meant to confer upon the insular legislature the power to impose it. (R. 12–15, 31–36.)

The tax, which Puerto Rico here asserts, is the conventional *ad valorem* general property tax, involving valuation or assessment of both real and personal property as of a definite tax date annually (here January 15th) and the application of a uniform rate. This tax has been levied by the insular government substantially during the entire period of American sovereignty; statutory authorization for it is contained in the Political Code of Puerto Rico (March 1, 1902, Title IX, c. 1, Sections 285 to 352).[1] The particular language here governing provides (Section 297):

> That all personal property within or without Puerto Rico shall be assessed to the

[1] Pertinent provisions are included in the Appendix, *infra*, pp. 15–17.

> owner thereof * * * on the fifteenth day of January, * * *

The tax is imposed for a fiscal year, beginning the following July 1st, and is payable semi-annually in advance on the first days of July and January. It is settled that merchandise located in San Juan harbor is "within" Puerto Rico. *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362.

While taxpayer argues that this statute was not intended to apply instantly, it concedes that the insular Supreme Court "did not expressly base its judgment on this point, and did not discuss or mention it." (Pet. 8.) Moreover, it is plain from its opinion that the insular court affirmatively held that the local statute imposed the tax. The question of "power" of the insular legislature is the one to which the insular court in its opinion explicitly directed itself. (R. 17.) Surely, had it not construed the local statute to include the disputed tax, under well settled principles, the question of power would never have arisen. Indeed, repeatedly its opinion evidences its holding that the local statute imposed the tax. (R. 19–20, 23, 24, 32, 37.)

Concededly the disputed tax "is literally authorized by the broad terms of Sections 285 and 297 of the insular Political Code." (Br. 22.) Hence, on well settled principles, assuming that Congress first conferred the power to impose the tax, under the instant circumstances, upon the

insular legislature in 1927 by the Butler Act, Act of March 4, 1927, c. 503, 44 Stat. 1418, Section 1, amending Section 3 of the Organic Act (Appendix, *infra,* pp. 13–14), there is no *a priori* reason to suppose that the legislature did not intend it to apply here. Taxpayer concedes the case is within the language of the statute; therefore, it is within its operation, since it cannot validly be claimed that if the particular case had been called to the insular legislature's attention, it would have varied the statute. *Puerto Rico* v. *The Shell Co.,* 302 U. S. 253, 257; *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 644; *Rivera* v. *Buscaglia,* 146 F. 2d 461, 463 (C. C. A. 1st).

Nor is it significant, despite taxpayer's argument to the contrary (Br. 32) that subsequent to the passage of the Butler Act, the insular legislature amended existing excise tax laws by expressly extending them to apply on introduction of articles into Puerto Rico and that no corresponding change has been made with respect to the property tax here involved, since obviously, no additional insular legislation was requisite, after the Butler Act, to apply the property tax to goods in customs custody. The provisions of the existing statute (Political Code, Section 297, Appendix, *infra,* pp. 16–17) already sufficed to include all personal property "within or without Puerto Rico," to which the power to tax of the insular legislature extended. On the other hand, in the case of excises, it was requisite expressly to ex-

tend the imposition of the tax to the *introduction* of the articles into Puerto Rico, for that was made the taxing point or act.

In any event, clearly the only question involved in the case, and the only one upon which the court below ruled, is the construction of the meaning of Congress in the Organic Act, as originally passed and as amended by the Butler Act; clearly no question of local law is involved. The error claimed in the judgment of the insular court, which we contend the court below properly corrected, was founded solely on construction by the local court of federal legislation and of the intent of Congress.

2. The court below was clearly correct in holding that Section 3 of the Organic Act as amended by the Act of March 4, 1927 (Butler Act), authorized the insular legislature to levy the instant tax as an "internal revenue" tax upon an article as soon as brought into the island.[2] (R. 53–55.) The holding of the insular Supreme Court on the other hand was that a property tax, such as that

[2] The Butler Act (Act of March 4, 1927), to the extent here pertinent, amended Section 3 of the Organic Act so that, as amended, it read as follows (Appendix, *infra*, pp. 13–14):

> SEC. 3 [as amended by Act of March 4, 1927, c. 503, 44 Stat. 1418, Sec. 1]. That no export duties shall be levied or collected on exports from Puerto Rico, but taxes and assessments on property, income taxes, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may

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instantly involved, does not fall within the classification of "internal revenue" taxes within the meaning of the Butler Act or the Organic Act. (R. 35–36.) This, it seems clear, the insular court regarded as decisive; if it had understood the Butler Act to include property taxes within the meaning of "internal revenue" taxes, the tax must have been sustained.[3] (R. 31–36.)

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be provided and defined by the Legislature of Puerto Rico; * * *.

And it is further provided, That the internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: *Provided*, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Puerto Rican government in the collection of these taxes. (48 U. S. C. 1940 ed., Secs. 741 and 741 (a).)

The Butler Act added the entire second paragraph, quoted above, and the words "income taxes" to the first paragraph.

[3] Moreover the insular court recognized that an unfortunate consequence of its construction of the Butler Act was the possibility of tax discrimination against merchandise brought into the island from the United States in favor of merchandise imported from foreign countries. (R. 34.) Thus, if the decision of the insular court had been sustained, merchandise brought into Puerto Rican ports from the United States and not yet unloaded from the incoming vessel on the assessment date would have been subject to the instant property tax, which, on the other hand could not have been

Since the statute under consideration is in the nature of a Constitution for the territory, the court below correctly afforded it a broad and not a narrow construction. *Puerto Rico* v. *Shell Co.*, *supra*. Certainly Congress meant, when it wrote "internal revenue" into this fundamental statute, all the "revenue" which the background and legislative history of both nation and possession had classified as "internal," and this clearly comprehended property taxes.

"Internal revenue" is a term characteristic of the legislation and fiscal administration of the United States and although apparently not explicitly defined by statute, it maybe traced back to an early period in our national history. *"The Federalist"* discusses internal taxes and in particular Nos. 30 and 36, attributed to Hamilton, explicitly include among internal taxes, direct property taxes. In

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levied on merchandise similarly situated, imported from a foreign country, as was the merchandise here. (R. 34, fn. 20a; R. 43–44, fn. 25.) This would follow from the fact that the customs authorities obtain no jurisdiction over American goods. Clearly it is more consonant with the purpose of the statute, its language, and its legislative history to hold that Congress intended to cover the subject completely and in particular did not mean to legislate and discriminate against American goods. This is the express proviso of the statute. See also the Senate Committee Report which recommended the amendment (S. Rep. No. 1011, 69th Cong., 1st Sess., p. 2). In *West India Oil Co.* v. *Domenech*, 311 U. S. 20, 27, rehearing denied, 311 U. S. 729, this Court clearly indicated its understanding that the Butler Act, so far as concerns local taxation, intended American and foreign goods to be treated alike, not that foreign goods be preferred.

the first decade of government under the Constitution, property taxes actually were imposed by Congress under the head of internal revenue taxes and directed to be collected by "collectors of the internal revenues of the United States." Act of July 14, 1798, c. 75, 1 Stat. 597, 598, Section 2. Similarly the direct property taxes imposed during the War of 1812 and the War between the States were in both instances regarded and administered as internal revenue. Act of July 22, 1813, c. 16, 3 Stat. 22, 25, Sections 1 and 2. Act of July 1, 1862, c. 119, 12 Stat. 432, 446, Sections 1 and 38.

From the beginning the insular Political Code had provided that the instant property tax be assessed and collected by "internal revenue agents" (Sections 288 and 289).

"License fees" and "royalties for franchises, privileges and concessions" surely are included within the meaning of the term "internal revenue". Hence, properly construed, the several types of taxes mentioned in Section 3 of the Organic Act, contrary to the assumption of the insular Supreme Court (R. 35–36) and taxpayer (Br. 25), are not necessarily to be regarded as mutually exclusive. Congress desired to confer upon the insular legislature the broadest taxing powers and some of the classes of taxes named obviously overlap. Similarly, the Constitution in authorizing Congress "To lay and collect Taxes, Duties, Imposts

and Excises" (Article I, Section 8); in prohibiting "tax or Duty" on exports (Article I, Section 9); and by the Import Clause, denying to the states the authority to "lay any imposts or Duties on Imports or Exports" (Article I, Section 10, Appendix, *infra*, p. 13), employed broad and overlapping terms for several types of taxes, which are not mutually exclusive.

Moreover although a sales tax was directly involved in *West India Oil Co.* v. *Domenech,* 311 U. S. 20, rehearing denied, 311 U. S. 729, this Court there held the plain purport of the Butler amendment to be that *any tax* authorized by the Organic Act may be levied with respect to articles as soon as brought into the island. Had this Court in the cited case construed the Butler amendment to refer to a limited type of tax only, namely internal excise taxes, surely the broad language of the opinion (pp. 27–28) would not have been employed. The court below correctly applied the cited case here.

3. The question here involved is not important and its settlement is not requisite in the public interest. The tax is assessed on only one day in a year; the instant facts are not likely, except by rare coincidence, to be presented to the courts in another case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1947

APPENDIX

Constitution of the United States of America:

ARTICLE I.

* * * * *

SECTION 10. * * *

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

* * * * *

ARTICLE IV.

* * * * *

SECTION 3. * * *

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *

Organic Act of Puerto Rico (Act of March 2, 1917), c. 145, 39 Stat. 951, as amended by the Act of May 17, 1932, c. 190, 47 Stat. 158:

* * * * *

(48 U. S. C. 1940 ed., Sec. 737.)

SEC. 3 [as amended by Acts of March 4, 1927, c. 503, 44 Stat. 1418, Sec. 1]. That

no export duties shall be levied or collected on exports from Puerto Rico, but taxes and assessments on property, income taxes, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Puerto Rico; * * *.

And it is further provided, That the internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: *Provided,* That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Puerto Rican government in the collection of these taxes. (48 U. S. C. 1940 ed., Secs. 741 and 741a.)

SEC. 37. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities so far as may be necessary, and to provide and repeal laws and ordinances therefor; also the power to alter, amend, modify, or repeal any or all laws and ordinances of every character now in force in Puerto Rico or municipality or district thereof in

so far as such alteration, amendment, modification, or repeal may be consistent with the provisions of this Act.

* * * * *

Political Code of Puerto Rico (March 1, 1902):

SEC. 285. (Repealed by implication by the following section of an Act approved March 12, 1908, p. 187).

SECTION 1. That for and during the fiscal year beginning the first day of July, nineteen hundred and eight, and ending the thirtieth day of June, nineteen hundred and nine, and in every succeeding fiscal year, unless otherwise provided by the Legislative Assembly of Puerto Rico, there shall be levied and collected, for the purpose of providing Insular and municipal revenue, by the Insular Government, a tax of ten one-hundredths of one per cent and by the municipalities a tax of not exceeding ninety one-hundredths of one per cent upon the value of all real and personal property in Puerto Rico, and of all personal property of persons residing in Puerto Rico, to be ascertained as hereinafter provided, not hereinafter exempted from taxation. * * *

SEC. 290. (As amended by Act of March 10, 1904, p. 169.) That all property not expressly exempted from taxation shall be assessed and taxed. For the purposes of the assessment and collection of taxes, real property shall be deemed to be synonymous with immovables as defined in sections 333, 334 and 335 of the Civil Code: *Provided, however,* That machinery, vessels, instruments or implements not fixed to the building or soil shall not be deemed to be real property. Personal property shall include

such machinery, vessels, instruments or implements not fixed to the building or soil, livestock, money, whether in the possession of the owner thereof or held by or on deposit with some other person or institution, bonds, stocks, certificates in unincorporated syndicates or partnerships, patent-rights, trade-marks, franchises, concessions and all other matters and things capable of private ownership and not included within the meaning of the term "Real property," but shall not include book-credits, promissory notes nor other personal credits.

SEC. 293. Commission merchants and all persons dealing and trading on commission, assignees authorized to sell, and persons having in their possession property belonging to another, subject to taxation in the assessment district where said property is found, shall, for purposes of taxation be deemed the owners of the property in their possession.

SEC. 297. (As amended by Act of September 3, 1910, p. 37.) That all personal property within or without Puerto Rico shall be assessed to the owner thereof in the municipality in which he resides on the fifteenth day of January, except that such personal property as goods, wares, merchandise, and other stock-in-trade; machinery employed in any branch of manufacturing or business, including machines leased or operated under a stipulation providing for the payment of a royalty; horses and other livestock, and all other personal property having a permanent location within a municipality shall be assessed to the owner in the municipality in which it is thus situated; and that shares of banks doing business in Puerto Rico

shall be assessed to their owners in the municipality where the banks are situated, as hereinafter provided.

SEC. 330. (As amended by Act No. 148 approved May 14, 1943.) The taxes imposed on real and personal property shall be payable semiannually in advance on the first day of July and January of each year. Such taxes shall become delinquent if not paid within sixty days after the date on which the same become due, * * *.

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